

In the Matter of Cassandra Lewis, Ancora Psychiatric Hospital
CSC Docket No. 2012-688
(Civil Service Commission, decided August 15, 2012)

Cassandra Lewis, a Secretarial Assistant 3 Non-stenographic with Ancora Psychiatric Hospital, represented by Michele Long-Vickers, Staff Representative, CWA Local 1040, appeals the appointing authority's failure to provisionally appoint her pursuant to *N.J.A.C. 4A:4-4.2(c)2i*, from the Management Assistant (PS7240K) eligible list.

By way of background, the appellant was in the second position on a December 1, 2008 certification of the eligible list. On that certification, a candidate from the previous list (PS2365K) appeared in the first position, followed by the appellant and the third ranking candidate by virtue of their score on the examination for (PS7240K). In disposing of the certification, the appointing authority permanently appointed the individual in the third position on the certification effective December 11, 2008. The appellant and the first-ranking candidate remained on the list as interested until it expired on November 26, 2011.

On appeal, the appellant argues that after the initial permanent appointment, she was interested in a provisional appointment but was not afforded an opportunity to interview and did not receive a response to her initial letters of interest in the position. Subsequently, she states that she responded to a January 21, 2010 notification of the appointing authority for an open "acting" position as Management Assistant. She accepted the position and performed those duties beginning on May 10, 2010, however, she neither received any additional compensation nor was her title officially changed. In support of her appeal, the appellant attaches that "acting" position notice, and also a letter dated August 5, 2011 from the appointing authority thanking her for her service in an "acting" capacity in the position of Management Assistant from May 9, 2010 to August 22, 2011. The appellant maintains that another employee was acting as a Management Assistant prior to her service, and she argues that that employee was not eligible to perform the duties of this title, and was found ineligible for the examination. She questions why the appointing authority was allowed to have an "acting" incumbent for three years.

In response to the appeal, the appointing authority states that it was not required to interview the appellant. It states that it permanently appointed the third-ranking candidate on December 1, 2008, and was unable to make a second appointment due to a hiring freeze. It states that its subsequent notice for an "acting" position indicated that there was no guarantee of additional pay or of becoming permanent in the position. The appointing authority confirms that the appellant began work in an acting capacity as a Management Assistant on May 9,

2010. It argues that she was counseled by her supervisor on several performance issues, and received training, but demonstrated no improvement. Accordingly, she was returned to her duties as a Secretarial Assistant 3, Non-stenographic.

CONCLUSION

N.J.A.C. 4A:4-4.2 provides, in pertinent part, that:

- (c) An appointing authority shall be entitled to a complete certification for consideration in making a permanent appointment, which means:

* * *

- 2. From promotional and open competitive lists, the names of three interested eligibles for the first permanent appointment, and the name of one additional interested eligible for each additional permanent appointment. Eligibles who receive the same score shall have the same rank. If three or more eligibles can be certified as a result of this ranking without resorting to all three highest scores on the list, then only those eligibles will be certified.
 - i. When fewer than three interested eligibles are certified and no provisional currently serving in the title is listed on the certification, the appointing authority may either: make a permanent appointment; make a provisional appointment from the list; make a provisional appointment of another qualified person if no eligible on the list is interested; or vacate the position/title.

In the instant matter, the appellant argues that she was not given a provisional Management Assistant position or afforded the opportunity to interview for the position, but rather received a position in an “acting” capacity. While there is no requirement for an interview under such circumstances, the appointing authority’s actions in this matter are otherwise improper. There is no such designation as an acting appointment under Civil Service rules. *N.J.S.A.* 11A:4-13 and *N.J.A.C.* 4A:4-1 *et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. *See In the Matter of Michael Shaffery* (MSB, decided September 20, 2006) and *In the Matter of Russell Davis* (MSB, decided August 10, 2005). The designation of such positions is clearly improper and

in violation of *N.J.A.C.* 4A:3-3.4 and *N.J.A.C.* 4A:4-4.2(c)2i. The appointing authority freely acknowledges the usage of the acting designation in this matter in the face of *N.J.A.C.* 4A:4-4.2(c)2i. Accordingly, the Civil Service Commission finds that the appellant is entitled to have her May 9, 2010 appointment designated a provisional appointment pursuant to *N.J.A.C.* 4A:4-4.2(c)2i, and she is entitled to corresponding differential pay from May 9, 2010 through August 22, 2011.

Further, Ancora Psychiatric Hospital should *immediately* discontinue the use of “acting” positions. The proper designation for such advancements would be either temporary appointments pursuant to *N.J.A.C.* 4A:4-1.7 or provisional appointments pending promotional procedures pursuant to *N.J.A.C.* 4A:4-1.5. If Ancora Psychiatric Hospital fails to comply with this directive in the future, it may be subject to fines or other penalties pursuant to *N.J.A.C.* 4A:10-2.1.

ORDER

Therefore, it is ordered that the appeal be granted and the appellant’s personnel record should reflect her provisional appointment as a Management Assistant from May 9, 2010 through August 22, 2011. It is further ordered that the appellant receive differential pay for that time period.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.